

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SHELDON G. ADELSON, an individual,) 2:06-CV-1590-ECR-PAL
Plaintiff,)
vs.) Order
MOSHE HANANEL,)
Defendant.)

Now before the Court is Defendant's motion for summary judgment (#222), filed on July 15, 2009. This motion comes late in the game – trial of this matter is set for October 6, 2009. The Magistrate Judge granted (#225) Defendant's motion (#221) to extend the deadline for filing such motions, so the motion for summary judgment (#222) is timely.

For the reasons set forth below, Defendant's motion for summary judgment (#222) will be denied.

I. Background

Plaintiff Sheldon G. Adelson ("Adelson") is an entrepreneur and a resident of Nevada. Defendant Moshe Hananel ("Hananel") is a former employee of one of Adelson's companies and a resident of Israel. Adelson and Hananel have been involved in litigation with

1 one another in various courts, both in the United States and Israel,
2 since 2003.

3 The present case constitutes the re-filing in Nevada of similar
4 claims first brought in the United States District Court for the
5 District of Massachusetts, which were dismissed for lack of personal
6 jurisdiction over Hananel. Adelson's Complaint (#1) was filed on
7 December 11, 2006, asserting claims for defamation and "civil
8 harassment" against Hananel. The parties have since engaged in
9 extensive discovery, among other things, and the case is now nearly
10 ready for trial. The Court entered the pretrial order (#226) on
11 July 15, 2009, and trial is set for October 6, 2009. The pretrial
12 order (#226) indicates that Adelson will assert only his claim for
13 defamation at trial.¹

14 The motion for summary judgment (#222) now before the Court
15 also was filed on July 15, 2009, together with a separately filed
16 memorandum of points and authorities (#223). Hananel opposed (#234)
17 the motion (#222), and Adelson replied (#237).

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19 **II. Summary Judgment Standard**

20 Summary judgment allows courts to avoid unnecessary trials
21 where no material factual dispute exists. N.W. Motorcycle Ass'n v.
22 U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court
23 must view the evidence and the inferences arising therefrom in the
24 light most favorable to the nonmoving party, Bagdadi v. Nazar, 84

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26 ¹ Adelson's opposition to the present motion confirms that
27 Adelson no longer asserts a claim for civil harassment. (See P.'s
Opp. at 4 n.3 (#234).)

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1 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment
2 where no genuine issues of material fact remain in dispute and the
3 moving party is entitled to judgment as a matter of law. FED. R.
4 Civ. P. 56(c). Judgment as a matter of law is appropriate where
5 there is no legally sufficient evidentiary basis for a reasonable
6 jury to find for the nonmoving party. FED. R. Civ. P. 50(a). Where
7 reasonable minds could differ on the material facts at issue,
8 however, summary judgment should not be granted. Warren v. City of
9 Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct.
10 1261 (1996).

11 The moving party bears the burden of informing the court of the
12 basis for its motion, together with evidence demonstrating the
13 absence of any genuine issue of material fact. Celotex Corp. v.
14 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met
15 its burden, the party opposing the motion may not rest upon mere
16 allegations or denials in the pleadings, but must set forth specific
17 facts showing that there exists a genuine issue for trial. Anderson
18 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the
19 parties may submit evidence in an inadmissible form - namely,
20 depositions, admissions, interrogatory answers, and affidavits -
21 only evidence which might be admissible at trial may be considered
22 by a trial court in ruling on a motion for summary judgment. FED.
23 R. Civ. P. 56(c); Beyene v. Coleman Security Services, Inc., 854
24 F.2d 1179, 1181 (9th Cir. 1988).

25 In deciding whether to grant summary judgment, a court must
26 take three necessary steps: (1) it must determine whether a fact is
27 material; (2) it must determine whether there exists a genuine issue

1 for the trier of fact, as determined by the documents submitted to
2 the court; and (3) it must consider that evidence in light of the
3 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary
4 judgment is not proper if material factual issues exist for trial.
5 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.
6 1999). "As to materiality, only disputes over facts that might
7 affect the outcome of the suit under the governing law will properly
8 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.
9 Disputes over irrelevant or unnecessary facts should not be
10 considered. Id. Where there is a complete failure of proof on an
11 essential element of the nonmoving party's case, all other facts
12 become immaterial, and the moving party is entitled to judgment as a
13 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a
14 disfavored procedural shortcut, but rather an integral part of the
15 federal rules as a whole. Id.

16 17 III. Analysis

18 Hananel's motion (#222) and accompanying memorandum of points
19 and authorities (#223) assert that he is entitled to summary
20 judgment on Adelson's claim for defamation. Hananel's arguments
21 boil down to two basic contentions: (1) Adelson's claims are barred
22 by the applicable statute of limitations; and (2) Adelson cannot
23 establish the damages element of a defamation claim. We will
24 address these two contentions separately.

25 A. Statute of Limitations

26 We may reject Hananel's arguments relating to the statute of
27 limitations with celerity because we have already rejected them

1 twice before. On January 16, 2008, we ruled from the bench that the
2 two-year statute of limitations on Adelson's defamation claim was
3 equitably tolled during the pendency of the previous action in the
4 District of Massachusetts, and the present action thus was timely
5 filed. (See Decl. of Ronald D. Kent, Ex. 8 (Transcript of Jan. 16,
6 2008 Hearing) at 5-10 (#235).) On March 6, 2008, we issued a Minute
7 Order (#125) denying Hananel's motion for reconsideration (#107) of
8 that issue.

9 As Hananel notes, our previous rulings on the statute of
10 limitations issue related to a motion to dismiss, whereas the
11 present motion seeks summary judgment. (See P.'s Memo. at 19-20
12 (#223).) Hananel fails to describe any specific reason, however,
13 why the current procedural posture of the case should make a
14 difference in our analysis, and we cannot discern any. There do not
15 appear to be any "contradicted facts" (id. at 19) that we previously
16 presumed to be true – as appropriate in ruling on a motion to
17 dismiss, but not a motion for summary judgment – that are relevant
18 to the equitable tolling analysis.

19 Thus, Hananel's motion (#222) will be denied with regard to the
20 issue of the statute of limitations for the reasons stated at the
21 hearing on January 16, 2008, and our Minute Order of March 6, 2008
22 (#125).

23 B. Defamation

24 A federal court sitting in diversity must apply the substantive
25 law of the forum state in which it resides. Vacation Village, Inc.
26 v. Clark County, Nev., 497 F.3d 902, 913 (9th Cir. 2007) (citing
27 Hanna v. Plumer, 380 U.S. 460, 465 (1965)). Under Nevada law, "an
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1 action for defamation requires the plaintiff to prove four elements:
2 '(1) a false and defamatory statement . . . ; (2) an unprivileged
3 publication to a third person; (3) fault, amounting to at least
4 negligence; and (4) actual or presumed damages.'" Clark County Sch.
5 Dist. v. Virtual Educ. Software, Inc., ---P.3d---, No. 50313, 2009
6 WL 2414820, at *6 (Nev. Aug. 6, 2009) (quoting Pope v. Motel 6, 114
7 P.3d 277, 282 (Nev. 2005)). If the defamatory communication
8 "imputes a 'person's lack of fitness for trade, business, or
9 profession,' or tends to injure the plaintiff in his or her
10 business, it is deemed defamation per se and damages are presumed."
11 Id. (quoting K-Mart Corp. v. Washington, 866 P.2d 274, 282 (Nev.
12 1993)). In determining whether a statement constitutes defamation
13 per se, words "are to be taken in their plain and natural import
14 according to the ideas they convey to those to whom they are
15 addressed; reference being had not only to the words themselves but
16 also to the circumstances under which they were used." Talbot v.
17 Mack, 169 P. 25, 29 (Nev. 1917).

18 Hananel argues that summary judgment is appropriate here
19 because Adelson failed to adequately plead damages and has produced
20 no evidence relating to damages. This argument, in turn, depends on
21 the premise that any allegedly defamatory statements at issue could
22 not be considered defamation per se, so damages are not presumed.

23 Only a single allegedly defamatory statement is at issue. The
24 statement is a quote attributed to Hananel in a newspaper article
25 published in the Las Vegas Sun on February 18, 2004. (D.'s Memo,
26 Ex. B (#223).) The article is about a lawsuit Hananel had brought
27 against Adelson in Israel alleging breach of contract. Adelson,
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1 through a spokesperson, apparently "characterized Hananel as a
2 disgruntled former employee and an opportunist who is using the
3 press and the media 'to extort a settlement.'" (Id.) Hananel
4 responded to that characterization, according to the author of the
5 article, with the statement at issue in this case: "Regarding
6 opportunism, the only opportunist here is Mr. Adelson, who uses the
7 fact that I'm blind now to expel me from my rights." (Id.)

8 Hananel argues that this statement could not constitute
9 defamation per se because "the defamatory meaning is not apparent on
10 its face . . . a person of ordinary intelligence would require
11 extrinsic facts and evidence, namely the history of the events and
12 the various lawsuits between the parties and substantive issues
13 included therein, to understand the alleged defamatory nature of the
14 statement." (D.'s Memo at 10-11 (#223).) We disagree.

15 Under Nevada law, mere innuendo may not be considered
16 defamation per se. Talbot, 169 P. at 31-32 (noting that "language
17 or terms which are not libelous per se . . . cannot be made so
18 through the function or force of an innuendo"). A statement,
19 however, that directly imputes to the plaintiff "dishonesty, lack of
20 fair dealing, want of fidelity, integrity, or business ability,"
21 even in general terms and without supporting details, is considered
22 defamation per se. Id. at 30. For example, in Talbot, the Nevada
23 Supreme Court discussed the following snippet of doggerel from an
24 earlier Minnesota defamation case: "Slippery Sam, your name is
25 pants." Id. at 33 (quoting Peterson v. W. Union Tel. Co., 67 N.W.
26 646, 646 (Minn. 1896)). This statement was considered "on its face
27 fairly susceptible of a libelous meaning," id., even though none of
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1 the details underpinning the assertion that "Sam" was "slippery," in
2 the sense of being "dishonest and apt to play one false," id., are
3 immediately discernible, and the precise meaning of "your name is
4 pants" is enigmatic.

5 Here, the precise meaning of the statement that Adelson "uses"
6 the fact that Hananel is blind to "expel [him] from [his] rights" is
7 somewhat unclear, and it is not even apparent which "rights" are
8 being referenced. At trial, the meaning of the statement would be a
9 for the jury to decide. See Branda v. Sanford, 637 P.2d 1223, 1225
10 (Nev. 1981) (noting that if an allegedly defamatory statement is
11 "susceptible of different constructions, one of which is defamatory,
12 resolution of the ambiguity is a question of fact for the jury").
13 Taking reasonable inferences in Adelson's favor, however, as we must
14 on a motion for summary judgment, this statement on its face may
15 fairly be understood to impute to Adelson a lack of fair dealing and
16 perhaps dishonesty or lack of integrity. Under Clark County and
17 Talbot, such a statement regarding a plaintiff, such as Adelson,
18 whose business would (again, taking reasonable inferences in
19 Adelson's favor) tend to be injured thereby, is deemed defamation
20 per se.

21 We conclude the statement at issue here is susceptible to a
22 construction that would be deemed defamation per se under Nevada
23 law. Thus, if the jury were to agree that the statement should be
24 so construed, damages would be presumed. See Clark County, 2009 WL
25 2414820, at *6. Hananel's challenges to the sufficiency of
26 Adelson's pleadings and evidence regarding damages therefore fail.

IV. Conclusion

For the third time, we repeat our ruling that Adelson's defamation claim was timely filed because the statute of limitations was equitably tolled during the pendency of the previous action in the District of Massachusetts. Further, the allegedly defamatory statement at issue in this case is susceptible to a construction that would be considered defamation per se under Nevada law. If the jury were to find that the statement should be so construed, damages would be presumed. Hananel's challenges to the sufficiency of Adelson's pleadings and evidence regarding damages, therefore, do not provide an appropriate basis for entry of summary judgment in his favor.

IT IS, THEREFORE, HEREBY ORDERED THAT Defendant's Motion for Summary Judgment (#222) is **DENIED**.

DATED: August 26, 2009.


UNITED STATES DISTRICT JUDGE